Supreme Court, U.S.
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No. 05-866

IN THE

Supreme Court of the United States

PHILADELPHIA HOUSING AUTHORITY,
JOHN WHITE and BARRY MILLER,
Petitioners,

v.

JACKIE MCDOWELL, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals err in requiring a district court to order a public housing agency to pay substantial compensatory civil contempt sanctions for past noncompliance with a consent decree's procedural requirements where the housing agency had already come into compliance with the consent decree, and the residents were not damaged or harmed by the agency's earlier noncompliance with the procedural requirements of the consent decree and of the United States Department of Housing & Urban Development procedural regulations that it tracks?

LIST OF PARTIES

The plaintiffs in this proceeding are Jackie McDowell, an individual, as a representative of a class of individual residents of the Philadelphia Housing Authority ("PHA"). The defendants are PHA, a governmental party, and two individuals, John White and Barry Miller, former PHA officials. No corporate disclosure statement is required because there are no nongovernmental corporations who are a party to this proceeding.

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OPINIONS AND ORDERS OF THE COURTS BELOW

The opinion and order of the United States Court of Appeals for the Third Circuit are reported at 423 F.3d 233 (3d Cir. 2005). The order of the United States District Court, No. 97-CV-02302 (E.D. Pa. March 9, 2004), is unreported. Copies of the Court of Appeals' and District Court's opinions and orders are provided in the Appendix hereto at App. 1a-12a and App. 13a-14a respectively.

Petitioner's Petition for Rehearing in the Court of Appeals was denied by the Court of Appeals by order dated October 17, 2005. A copy of that October 17, 2005 order is also provided in the Appendix at App. 15a-16a.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on September 13, 2005. A timely petition for rehearing was filed by petitioner Philadelphia Housing Authority on September 27, 2005. The petition for rehearing was denied by order of the Court of Appeals dated October 17, 2005. (App. 15a-16a). This Court has jurisdiction to review the judgment of the Court of Appeals for the Third Circuit by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

FEDERAL REGULATIONS INVOLVED

Section 965.507 of the United States Department of Housing and Urban Development's regulations (24 C.F.R. § 965.507) provides:

> § 965.507 Review and revision of allowances.
>
> (a) Annual review. The PHA [public housing agency] shall review at least annually the basis on which utility allowances have been established and, if reasonably required in order to continue adherence to the standards stated in § 965.505, shall establish revised allowances. The review shall include all changes in circumstances (including completion of modernization and/or other energy conservation measures implemented by the PHA) indicating probability of a significant change in reasonable consumption requirements and changes in utility rates.
>
> (b) Revision as a result of rate changes. The PHA may revise its allowances for resident-purchased utilities between annual reviews if there is a rate change (including fuel adjustments) and shall be required to do so if such change, by itself or together with prior rate changes not adjusted for, results in a change of 10 percent or more from the rates on which such allowances were based. Adjustments to resident payments as a result of such changes shall be retroactive to the first day of the month

following the month in which the last rate change taken into account in such revision became effective. Such rates changes shall not be subject to the 60 day notice requirement of § 965.502(c).

Also involved in this appeal are 24 C.F.R. §§ 965.501-965.506 and § 965.508. Copies of 24 C.F.R. §§ 965.501-965.508 are reproduced in the Appendix at App. 17a-22a.

STATEMENT OF THE CASE

This is an appeal from a ruling that requires a public housing agency, the Philadelphia Housing Authority ("PHA"), to pay substantial compensatory civil contempt sanctions to its residents for past noncompliance with procedural utility allowance revision requirements of a Consent Decree, although the residents were not harmed by, and indeed benefited from, the noncompliance with the utility allowance revision requirements. The Consent Decree, moreover, tracks United States Department of Housing and Urban Development ("HUD") regulations and the United States Court of Appeals for the Third Circuit interpreted those HUD regulations in its opinion. The Court of Appeals' decision therefore also interferes with HUD's regulations and imposes duties on public housing agencies different than those HUD chose to impose in its regulations.

The Consent Decree governs PHA's utility allowances for its public housing residents. Utility allowances are the amounts that a public housing agency, such as PHA, must pay or credit toward the monthly rent it charges to residents who buy utility services directly from a utility.[1] 24 C.F.R.

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[1] If the utility allowance is less than a resident's monthly rent, the allowance is credited against his or her rent. If the allowance is greater than a resident's rent, PHA sends the resident a monthly check in the amount of the difference. For example, if a resident pays $100 a month in rent and has a $40 a month utility allowance, he or she would get a $40 a month credit and owe only $60 in rent. If, however, the resident pays $100 in

§ 960.253, §§ 965.501-08. Utility allowances reduce the resident's rent or require a payment by the housing agency toward the resident's utilities so that the resident's rent and reasonable utility costs do not exceed federal rent limitations. 24 C.F.R. § 960.253. Utility allowances are based on both consumption estimates and the applicable utility rates. 24 C.F.R. § 965.505, § 965.507.

PHA entered into the Consent Decree in 1998 in settlement of a class action suit brought by a resident to enforce HUD's utility allowance regulations, 24 C.F.R. § 965.501 *et seq.* (App. 2a-4a). The Consent Decree required PHA (1) to make certain increases in its gas utility allowances for 1996 and 1997; (2) to review its utility allowances annually and, if appropriate, revise them; and (3) to revise its utility allowances between annual reviews when there were increases of 10 percent or more in the utility rates on which the allowance was partly based. (App. 25a-26a).

The Consent Decree's requirements concerning future review and revision of utility allowances track the language of HUD's regulation governing review and revision of utility allowances, 24 C.F.R. § 965.507. The Consent Decree requires that:

> 6. PHA shall, commencing with 1997, review, at least annually, the basis on which utility allowances have been established and, if reasonably required, shall establish revised allowances.
>
> 7. The annual review shall include all changes in circumstances indicating probability of a significant change in reasonable consumption requirements and changes in utility rates.
>
> 8. PHA may revise its allowances for resident-purchased utilities between annual reviews if there is a rate

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rent but gets a $120 a month utility allowance, he or she would pay no rent and get a monthly check in the amount of $20.

> change except that PHA shall revise its allowances for resident-purchased utilities between annual [reviews] if any change in utility rates, by itself or together with prior rate changes not adjusted for, results in a change of 10 percent or more from the rates on which the allowances were based.
>
> 9. Adjustments to utility allowances shall be retroactive to the first day of the month following the month in which the last rate change taken into account in such revision became effective.

(App. 3a-4a, 26a). HUD's utility allowance review and revision regulation, 24 C.F.R. § 965.507, similarly provides:

> (a) Annual review. The PHA [public housing agency] shall review at least annually the basis on which utility allowances have been established and, if reasonably required in order to continue adherence to the standards stated in § 965.505, shall establish revised allowances. The review shall include all changes in circumstances (including completion of modernization and/or other energy conservation measures implemented by the PHA) indicating probability of a significant change in reasonable consumption requirements and changes in utility rates.
>
> (b) Revision as a result of rate changes. The PHA may revise its allowances for resident-purchased utilities between annual reviews if there is a rate change (including fuel adjustments) and shall be required to do so if such change, by itself or together with prior rate changes not adjusted for, results in a change of 10 percent or more from the rates on which such allowances were based. Adjustments to resident payments as a result of such changes shall be retroactive to the first day of the month following the month in which the last rate change taken into account in such revision became effective. Such rates changes shall not be subject to the 60 day notice requirement of § 965.502(c).

24 C.F.R. § 965.507. (App. 21a-22a).

Respondents, a class of public housing residents, filed a motion in 2002 to enforce the Consent Decree and for civil contempt sanctions against PHA, because PHA had not revised gas utility allowances when the local gas utility company, Philadelphia Gas Works ("PGW"), had raised its rates by more than 10 percent during the period November 2000 and December 2002. (App. 4a). PHA, in response, made adjustments increasing its gas utility allowances. (App. 4a). As a result, PHA was in full compliance with the Consent Decree as of January 1, 2003. (App. 13a ¶ 1).

PHA also then undertook to revise its gas utility allowances as required in the Consent Decree and Section 965.507 of the HUD regulations, and as part of that revision analyzed whether the consumption factor in its utility allowances complied with HUD regulations and guidelines. (App. 29a-60a). This review and analysis of utility consumption data (adjusted for weather in accordance with HUD regulations) revealed that the consumption component that PHA had been using, and on which the 2000-02 gas utility allowances had been calculated, grossly exceeded reasonable consumption. (App. 30a-34a, 50a-57a; App. 5a; App. 14a ¶¶ 5-6). As a consequence, PHA residents, notwithstanding the increases in gas rates, had received almost $9.5 million in excess utility allowance payments and rent reductions over the utility allowances that they would have received if PHA had complied with the Consent Decree and revised its utility allowances at the time of the rate increases in 2000-02. (App. 67a).

The district court, after briefing, submission of evidence and oral argument, denied respondents' motion for monetary civil contempt sanctions on March 9, 2004. (App. 13a–14a). The court found that the overly high consumption factor in PHA's unrevised utility allowances more than compensated for the lower gas rates on which those utility allowances were based. (App. 14a ¶¶ 5-7). Moreover, the court determined that the lack of a revision of PHA's gas utility allowances,